



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

April 18, 2003

Mr. Michael D. Chisum
General Counsel
Texas Savings and Loan Department
2601 North Lamar, Suite 201
Austin, Texas 78705

OR2003-2647

Dear Mr. Chisum:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179727.

The Texas Savings and Loan Department (the "department") received a request for "all emails and correspondence regarding any complaints filed against [the department] by employees since the inception of [the department and] copies of the complaints themselves." You state that you have provided some information to the requestor but claim that the submitted records are excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we address your contention that the information in Exhibit 3 may not be released because of a confidentiality agreement. Information is not confidential under the Public Information Act (the "Act") simply because the party providing the information to the governmental body anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement specifying otherwise.

We next note that Exhibit 3 includes several completed evaluations, which are subject to section 552.022 of the Government Code. This section provides that "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," is public and may not be withheld unless it is expressly confidential under other law or excepted from

disclosure by section 552.108. Gov't Code § 552.022(a)(1). You do not claim that the submitted information is excepted under section 552.108. You assert that the submitted information is excepted under section 552.103. This section is a discretionary exception and is not "other law" for the purpose of section 552.022. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.103), 522 at 4 (1989) (discretionary exceptions in general). Therefore the evaluations may not be withheld on the basis of section 552.103. However, you also assert that the submitted information is excepted under sections 552.101 and 552.102, and we will address those arguments.

We first address your claim regarding section 552.103 for information other than the completed evaluations. This section provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.-Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); see Open

Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).¹ Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You assert that the department anticipates litigation by the requestor and that Exhibit 2 relates to that anticipated litigation. You state that these documents “relate to anticipated litigation between the Department and the requestor, as the requestor has indicated to the Department that she has consulted an attorney with respect to the termination of her employment with the Department and is following her attorney’s instructions in requesting these documents.” Having reviewed your arguments, we find that the department has failed to provide this office with concrete evidence that litigation with the requestor is reasonably anticipated for purposes of section 552.103. *See* ORD 361 (fact that potential opposing party has hired attorney who makes request for information does not establish that litigation is reasonably anticipated). Thus, none of the information in Exhibit 2 may be withheld pursuant to section 552.103, and we will consider your other arguments with respect to this information.

You also contend that Exhibit 3 relates to reasonably anticipated litigation. You have submitted information to this office showing that this exhibit pertains to a complaint filed with the Texas Commission on Human Rights (the “TCHR”) by another former department employee alleging discrimination. You have also supplied information indicating that the TCHR has dismissed the complaint and issued the former employee a notice of right to sue.² Based on the information you have provided, we conclude that you have shown that the department reasonably anticipated litigation with respect to Exhibit 3 at the time it received this request. *See, e.g.,* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982) (pending EEOC complaint indicates litigation is reasonably anticipated). In addition, our review of Exhibit 3 shows that it is related to the anticipated litigation for purposes of section 552.103(a). Thus, with the exception of the completed personnel evaluations, you have demonstrated the applicability of section 552.103 to Exhibit 3.

¹In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

²The TCHR operates as a federal deferral agency under section 706(c) of title VII, 42 U.S.C. § 2000e-5. The EEOC defers jurisdiction to the TCHR over complaints alleging employment discrimination. *Id.*

We note, however, that once information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). In this instance, Exhibit 3 contains documents addressed to and received from the former employee who filed the TCHR complaint and concerning the dispute at issue. This former employee is apparently the only potential opposing party in the anticipated lawsuit regarding her complaint. Thus, these documents may not be withheld pursuant to section 552.103, and we will consider whether your other claimed exceptions apply to them. We also note that the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982). In short, during the pendency of the litigation, you may withhold Exhibit 3 pursuant to section 552.103, with the exception of the completed personnel evaluations and the information to which the opposing party has previously had access.³

We turn now to your other arguments regarding Exhibit 2 and those portions of Exhibit 3 not excepted pursuant to section 552.103. The department claims that section 21.304 of the Labor Code makes the information in Exhibit 3 confidential.⁴ Section 21.304, which relates to public release of information obtained by the TCHR, provides as follows:

An officer or employee of the *[Texas] commission [on Human Rights]* may not disclose to the public information obtained by the commission under Section 21.204 except as necessary to the conduct of a proceeding under this chapter.

Labor Code § 21.304 (emphasis added). This prohibition on the release of information does not, however, apply to the department. Cf. Open Records Decision No. 155 (1977) (information not confidential when held by city as employer charged with discrimination). Consequently, while section 21.304 makes confidential certain information if it is in the possession of the TCHR, this confidentiality does not extend to the same information if it is in the possession of the department. See Open Records Decision No. 478 at 2 (1987) (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (statute explicitly required confidentiality). Thus, none of the information in Exhibit 3 may be withheld pursuant to section 552.101 in conjunction with section 21.304.

You also assert that Exhibit 2 and the remainder of Exhibit 3 must be withheld under section 552.101 in conjunction with the common law right of privacy and under section 552.102. Section 552.102 excepts from disclosure "information in a personnel file,

³Because of our ruling on this issue, we need not address your arguments regarding section 56.001 of the Occupations Code.

⁴Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information made confidential by statutes outside the Public Information Act.

the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. We will therefore consider your claims regarding common law privacy under section 552.101 together with your claims regarding section 552.102.

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if it (1) contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Id.* at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

Having reviewed Exhibit 2 and the remainder of Exhibit 3, we conclude that none of the information they contain is protected by common law privacy. See Open Records Decision Nos. 470 (1987) (public employee’s job performance does not generally constitute his private affairs), 455 (1987) (public employee’s job performance or abilities generally not protected by privacy), 444 at 4 (1986) (public will frequently have legitimate interest in personnel file information relating to public employees, and thus even highly intimate or embarrassing information generally will be open to public), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job), 400 at 5 (1983) (information protected only if release would lead to clearly unwarranted invasion of employee’s privacy), 336 at 2 (1982) (names of employees taking sick leave and dates of sick leave taken not excepted from disclosure under statutory predecessor); see also Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Accordingly, none of the remaining information may be withheld under section 552.101 or section 552.102 of the Government Code in conjunction with common law privacy.

You also assert that the submitted information is confidential under constitutional privacy. Constitutional privacy, which is also incorporated by section 552.101, consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual’s autonomy within “zones of privacy” that include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual’s privacy interests and the public’s need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy and includes only information that concerns the

“most intimate aspects of human affairs.” *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). We have reviewed the remaining submitted information and conclude that none of it comes within one of the constitutional zones of privacy or involves the most intimate aspects of human affairs. *See* Open Records Decision Nos. 470, 455, 444, 423 at 2. We therefore find that none of the remaining submitted information may be withheld on the basis of constitutional privacy.

We note, however, that Exhibit 2 includes e-mail addresses of members of the public. Section 552.137 of the Government Code provides that “[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Public Information Act].” Section 552.137 does not apply to a business’s general e-mail address or website or a government employee’s work e-mail address. We have marked the e-mail addresses that must be withheld pursuant to section 552.137 unless their owners have consented to their release.

In summary, pursuant to section 552.103 of the Government Code, the department may withhold Exhibit 3 with the exception of completed personnel evaluations and documents to which the opposing party has previously had access. The marked e-mail addresses in Exhibit 2 must be withheld unless their owners have affirmatively consented to their release. The remaining submitted information must be released.

Although you request that this office issue a previous determination with respect to this type of information, we decline to do so at this time. Accordingly, this letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records

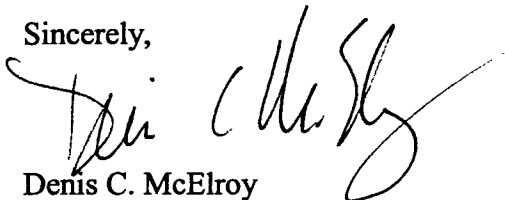
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/seg

Ref: ID# 179727

Enc. Submitted documents

c: Ms. Janelle Rudd
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(w/o enclosures)